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No. 78-972

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY APFELBAUM

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 584 F.2d 1264.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1978. A petition for rehearing was denied on October 16, 1978 (Pet. App. 24a). On November 6, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 15, 1978. The petition was filed on that date and was granted on March 19, 1979 (A. 80). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in prosecuting a grand jury witness for testifying falsely under a grant of immunity, the government may introduce at trial relevant portions of the witness's immunized testimony other than the statements charged as the *corpus delicti* of the false statements offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The federal immunity statute, 18 U.S.C. 6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

1. In 1976, respondent was called to testify before a federal grand jury in the Eastern District of Pennsylvania. The grand jury was investigating alleged criminal activities by the president and the general manager of the Chestnut Hill Lincoln-Mercury automobile dealership in Philadelphia (Tr. 4–9). The investigation focused on a robbery of $175,000 in cash that occurred at the dealership on April 16, 1975, and allegations that that robbery might have been staged by the dealership's principals (Tr. 5, 9). The grand jury sought to question respondent to determine whether he was an aider and abettor or an accessory after the fact to the allegedly staged robbery (Tr. 8–9). Respondent at that time was an administrative assistant to the Philadelphia District Attorney.

Relying on his privilege against compulsory self-incrimination, respondent refused to testify. On October 20, 1976, he was granted immunity under 18 U.S.C. 6002 and was recalled before the grand jury (A. 5–6). Respondent still refused to testify. He was then held in contempt under 18 U.S.C. 1826 and confined for six days. Respondent subsequently agreed to testify before the grand jury, and on December 13, 1976, and January 3, 1977, he testified pursuant to the immunity order (Pet. App. 2a–3a; Tr. 3–8).

Respondent was questioned before the grand jury about his financial dealings with Harry Brown, the general manager of the automobile dealership. In particular, he was asked whether he had been involved in obtaining a $10,000 loan for Brown in early 1975, whether he had attempted to locate Brown in Florida in 1975, and why he had met with Brown in Florida in early

1976 (A. 32–70). Respondent denied that he had tried to locate Brown in Florida in 1975 (A. 45–46, 54), and he also denied that he had told FBI agents he had lent $10,000 to Brown (A. 33, 35, 33, 39, 60, 62). In July 1977 the grand jury indicted respondent,[1] charging that these two statements were false, that respondent knew they were false, and that the questions asked by the grand jury were material to its investigation (A. 7–18; Pet. App. 3a).[2]

The indictment contained excerpts from the grand jury proceedings in which respondent made the allegedly false statements. The first count of the indictment recited the portion of respondent's December 13, 1976, grand jury testimony in which he denied that he had tried to locate Brown in Florida in December 1975 (Pet. App. 3a–5a). The second count recited the portions of his December 13, 1976, and January 3, 1977, testimony in which he denied that he had told FBI agents that he had lent $10,000 to Brown.

2. The evidence at trial showed that in February 1975 respondent and Brown had applied for a $10,000 loan at the Industrial Valley Bank in Philadelphia, where Brown had maintained an account in connection with the Chestnut-Hill automobile dealership (Tr. 200–203, 298). This loan application was purportedly made on behalf of respondent's superior, Philadelphia District

[1] The grand jury initially indicted respondent in April 1977 on three counts of making false material declarations before the grand jury. That indictment was dismissed by the district court on grounds not pertinent here.

[2] The district court found that the statements were material (Tr. 440) on the basis of the government's proof, outside the presence of the jury, regarding the nature of the grand jury's investigation. Brown and the president of the Chestnut Hill automobile dealership were subsequently convicted on charges of mail fraud, racketeering, collecting extensions of credit by extortionate means, and conspiracy (Pet. App. 3a, n.2; *United States* v. *Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, Nos. 78–791 and 78–896 (Feb. 21, 1979)).

Attorney F. Emmett Fitzpatrick (Tr. 204, 298). The loan was approved, and in early March $10,000 was credited to a checking account in Fitzpatrick's name (Tr. 215, 221–224). In the following week, checks for $9,500 and $475 were drawn on the account and cashed by Brown (Tr. 226–229, 231–235). Thereafter, respondent made interest payments on the loan until it was repaid approximately 13 months later with a check drawn on an account Fitzpatrick had with another bank (Tr. 231–235, 290).

In December 1975, respondent applied to the same bank for a $2,500 loan. He told two bank officials at that time that he would be travelling to Florida and that he intended to contact Brown while he was there (Tr. 239–241, 298–299). A few days later, respondent visited a school in Fort Lauderdale, Florida, where Brown's daughter was enrolled (Tr. 137). Respondent displayed his identification from the Philadelphia District Attorney's office, stated that he was a friend of Brown, and asked for Brown's address (Tr. 137, 146). He was told that that information could not be released without Brown's authorization (Tr. 138). The next day, a school official contacted respondent at a local hotel and advised him that Brown could not be reached (Tr. 151). Later in the month, respondent tried to obtain Brown's address from a bank in Florida (Tr. 165–170).

In March 1976, respondent was questioned by two FBI agents who were assigned to the investigation of the automobile dealership where Brown had worked (Tr. 301–302, 325–327). Respondent told the agents that in December 1975 he had tried to locate Brown in Florida because, through an "extremely complicated arrangement," he had lent $10,000 to Brown and wanted to recover the money (Tr. 303–315, 328–331).

In addition to the foregoing evidence and the false statements alleged in the indictment, the government offered in evidence other portions of respondent's grand jury testimony in order to put the charged statements in context and to show that respondent knew they were

false (Pet. App. 8a & n.5).[3] These excerpts concerned respondent's relationship with Brown, his 1976 trip to Florida to visit Brown, the discussions he had with Brown on that occasion, and his denial that he had had financial dealings with the automobile dealership in Philadelphia or had co-signed a loan for Brown (A. 52–53, 56–62, 64–67). Respondent objected to the use of any of his immunized testimony except the portions charged in the indictment as false. The district court overruled the objection and admitted the excerpts on the ground that they were relevant to prove that respondent had knowingly made the charged false statements (A. 25–27; Pet. App. 8a–9a).[4] The jury found respondent guilty on both counts of the indictment (A. 4), and the court sentenced him to concurrent terms of two years' imprisonment (A. 4).

3. The court of appeals reversed, relying on its earlier decisions in *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973), and *United States* v. *Frumento*, 552 F.2d 534, 541–543 (3d Cir. 1977) (en banc). The court held that the government could introduce only those portions of respondent's immunized testimony that were charged as the *corpus delicti* of the false statements prosecution (Pet. App. 11a–12a). Those immunized statements that "did not form the core of, and which were not incorporated in, the indictment" could not be introduced, the court held (*id.* at 16a). Although the court acknowledged that a grant of immunity does not protect a witness from prosecution for perjury or false declarations, it concluded that the Constitution permits only "severely restricted" use of immunized testimony in a perjury or false declarations prosecution (Pet. App. 9a–13a). This "severely restricted" use, according to the court, includes "only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context" (*id.* at 14a & n.9) (emphasis in original).

[3] In order to minimize the risk of unfair prejudice, references to the racketeering and extortion offenses that the grand jury was investigating were omitted from the parts of the grand jury proceedings that were read to the jury (A. 26–27).

[4] As the court of appeals noted (Pet. App. 9a n.7), respondent objected to the admission of only certain portions of the grand jury testimony; he affirmatively sought to have other portions admitted (A. 22). The government did not argue in the court of appeals and we do not argue here that respondent's acquiescence in the admission of certain parts of the grand jury testimony constituted a waiver of his privilege against compulsory self-incrimination with respect to the rest of the testimony.

SUMMARY OF ARGUMENT

A witness who validly invokes his privilege against compulsory self-incrimination can nevertheless be compelled to testify if he is granted immunity in exchange for his testimony. In order to displace the privilege, however, the grant of immunity must be coextensive with the scope of that privilege. That is, the immunity must protect the witness against the use of his testimony, direct or derivative, to prosecute him for any offense for which he could have been prosecuted at the time he invoked his privilege.

Although the government may not use a witness's immunized testimony in prosecuting him for any offenses about which he testifies, the immunized witness must testify truthfully. If his testimony is untruthful, he can be prosecuted for perjury or for making false statements. The policy underlying this rule is obvious: The purpose of immunizing a witness is to obtain his truthful testimony. If the grant of immunity entitled a witness to lie with impunity, the immunity power would be of little value to the administration of justice. Thus, because perjury undermines the entire purpose for which immunity is granted, an immunized witness in-

dicted for false swearing is not entitled to the benefits of the immunity he is charged with abusing.

The question in this case is whether, in a prosecution of a witness for false swearing in the course of his immunized testimony, the government can introduce all relevant portions of the witness's testimony to prove that the testimony was knowingly false. Because neither the Constitution nor the federal immunity statute prohibits the introduction of that evidence, the court of appeals erred in reversing respondent's conviction on that ground.

1. It is clear that portions of a witness's testimony other than the charged false statements may be relevant in a prosecution for false swearing before a grand jury. The government must prove that the questions to which the witness is alleged to have given false answers were material to the grand jury's investigation, and it must prove that the witness knew his answers were false. The context of the witness's allegedly false testimony is often highly relevant to both issues: the nature and course of the grand jury's investigation is often best shown by a transcript of the proceedings, and the witness's state of mind is often most tellingly revealed by the entire course of his testimony. If the witness is evasive throughout or on particular points, for example, the jury may fairly conclude that any false statements he may have made were intentional.

2. The Fifth Amendment does not prohibit the introduction of relevant immunized testimony to prove that other portions of the testimony were perjured. Because the immunity granted to a witness must be as broad as the privilege it displaces, it is necessary to determine the scope of the privilege at the time the witness's testimony is compelled in order to determine the scope of the immunity that is conferred.

The privilege protects a witness against being compelled to give testimony that subjects him to real and substantial risks of incrimination; it does not protect him against risks that are speculative or remote. In

particular, the privilege ordinarily does not protect against the danger of incrimination for crimes the witness may choose to commit in the future. In this case, respondent's privilege against compulsory self-incrimination entitled him to refuse to testify about the offenses that the grand jury was investigating until he was given a grant of immunity that would protect him from use of his testimony against him to prove any offenses about which he might testify. Similarly, if respondent had previously given a false sworn statement about the matters that were the subject of the grand jury questioning, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would generate evidence that could be used against him in a prosecution for false swearing on the prior occasion. But if he had asserted his privilege on the ground that his grand jury testimony would be incriminating if he should choose to perjure himself in the course of the proceeding, his claim would not have been upheld. The privilege simply was not designed to authorize a witness to commit perjury.

Because respondent could not have made a valid assertion of the privilege with respect to a possible future act of false swearing, the immunity he was granted does not protect him from the use of relevant portions of his testimony to prove that he made a false declaration before the grand jury.

3. The federal immunity statute, 18 U.S.C. 6002, similarly does not prohibit the use of the relevant portions of respondent's grand jury testimony. By its terms, the statute permits the use of immunized testimony in any prosecution for "perjury" or "giving a false statement." Thus, the plain terms of the statute permit the use made here. Moreover, the legislative history of the immunity statute clearly shows that Congress intended to confine the scope of the immunity to that required by the Constitution, and no more. Accordingly, if the Constitution permits the use of all rel-

evant portions of a witness's immunized testimony to prove that the witness made false declarations under the grant of immunity, the federal immunity statute should be read to permit that use as well.

ARGUMENT

RELEVANT PORTIONS OF RESPONDENT'S IMMUNIZED GRAND JURY TESTIMONY WERE PROPERLY INTRODUCED TO PROVE THAT HE LIED WHILE TESTIFYING UNDER THE GRANT OF IMMUNITY

A. Determining Whether A Witness Has Testified Falsely in a Proceeding Often Requires Consideration of Portions of His Testimony Other Than Those Alleged to be False.

In a prosecution for perjury or making false declarations, the government must prove not only that the defendant gave material false statements under oath, but also that he believed that his testimony was false. See, *e.g.*, *United States* v. *Boberg*, 565 F.2d 1059, 1061 (8th Cir. 1977); *United States* v. *Damato*, 554 F.2d 1371, 1372 (5th Cir. 1977); *United States* v. *Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976). Both elements—and particularly the latter—are difficult to prove in many cases. See, *e.g.*, *United States* v. *Sweig*, 441 F.2d 114, 117–118 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

Often the best evidence that a defendant knowingly gave false testimony that was material to the grand jury's investigation is provided by the context in which the statement was made. With respect to the issue of materiality, a transcript of the proceeding at which the alleged perjury was committed is commonly introduced by the prosecution because "the best way to know what the grand jury deems material is by reading what it asked about." *United States* v. *Abrams*, 568 F.2d 411, 421 (5th Cir.), cert. denied, 437 U.S. 903 (1978). See also *United States* v. *Crippen*, 570 F.2d 535, 539 (5th Cir. 1978), cert. denied, No. 78–538 (Jan. 8, 1979); *United States* v. *Koonce*, 485 F.2d 374, 380–381 (8th Cir. 1973).

With respect to the issue of knowledge, direct evidence is seldom available. Instead, the jury ordinarily must draw inferences about the defendant's knowledge from all the circumstances surrounding the offense. The context in which a witness makes allegedly false statements is highly relevant to the question whether he knew his statements were false.[5] For example, if a witness is evasive in answering certain questions, the jury may properly infer that his false testimony on those points is conscious rather than unwitting or inadvertent. See *United States* v. *Kopel*, 552 F.2d 1265, 1269–1270 (7th Cir.), cert. denied, 434 U.S. 970 (1977); *Gebhard* v. *United States*, 422 F.2d 281, 289 (9th Cir. 1970). A witness's responses to other questions may cast doubt on the truth of the statements at issue or undercut the witness's claim that he did not realize his testimony was false. See *United States* v. *Demopoulos*, 506 F.2d 1171, 1177 (7th Cir. 1974), cert. denied, 420 U.S. 991 (1975); *Gebhard* v. *United States*, *supra*, 422 F.2d at 289; *United States* v. *Remington*, 191 F.2d 246, 250–251 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952); *Meyers* v. *United States*, 171 F.2d 800, 804, 806–807 (D.C. Cir. 1948), cert. denied, 336 U.S. 912 (1949).[6]

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[5] See *Harrell* v. *United States*, 220 F.2d 516, 520 (5th Cir. 1955): "Only by a full understanding of the issues on trial at the time the alleged perjury was committed can the jury determine the willfulness of the defendant in giving his testimony. One way to prove these issues, subject to the discretion of the trial court, is by the transcript of the testimony taken at that trial."

[6] Of course, considering statements in context may also aid the defendant. A willingness to correct an earlier statement or a general display of seemingly honest confusion may negative intent by demonstrating an intent to answer truthfully or a lack of understanding of a particular line of questioning. See *Bronston* v. *United States*, 409 U.S. 352, 358 (1973); *United States* v. *Lococo*, 450 F.2d 1196, 1198 n.2 (9th Cir. 1971).

The court of appeals acknowledged that the portions of respondent's immunized testimony that were used at his trial were "relevant to the prosecution's case" (Pet. App. 8a). Excerpts from respondent's immunized testimony that were used at his trial had a particularly significant bearing on whether his statements were knowingly false. For example, respondent's general evasiveness about his relationship with Brown and about his interview with the FBI agents in 1976 (A. 34–36, 40–41, 52–53, 57–63, 67), supports the allegation that he was dissembling when he denied telling the FBI that he had lent $10,000 to Brown. Moreover, respondent's testimony about his trip to Florida in March 1976 casts doubt on the truth of his testimony that he had not tried to locate Brown when he was in Florida during the preceding December. Respondent testified that he had gone to Florida in March 1976 for a weekend vacation and that he had no intention of contacting Brown at that time (A. 46–47). He explained that he discovered through a friend that Brown was there and that he contacted Brown at a used car dealership where Brown worked. As a result of this casual encounter, respondent testified, he spent most of the remainder of the weekend with Brown and his family (A. 45, 47–48, 56–60, 65, 69). Respondent was unable, however, to tell the grand jury the identity or even the sex of the person from whom he had allegedly learned that Brown was in Florida (A. 65–67). In addition, respondent had great difficulty reconciling his testimony that he went to Florida on a weekend vacation for a rest and that he contacted Brown "just to say hello" with his testimony that he spent a large part of the weekend at Brown's home (A. 47–48, 52, 59, 60–69).

The clear inference to be drawn from this testimony is that respondent knew Brown well, that he travelled to Florida in March 1976 in an effort to locate Brown, and that his effort at that time was a continuation of an earlier attempt to locate Brown in Florida in December 1975. Accordingly, respondent's account of the March

1976 trip significantly buttressed the government's contention that respondent's testimony concerning the December 1975 trip was false.

The rule adopted by the court of appeals—that only the allegedly false portions of respondent's immunized testimony could be introduced at his trial—would prohibit the introduction of any of this highly probative evidence. The Third Circuit's ruling would thus make it much harder to prosecute immunized witnesses for perjury than to prosecute witnesses who have not been given immunity. This "partial immunity" from prosecution for perjury for immunized witnesses conflicts with the basic proposition that immunity provides no protection against a prosecution for perjury. Accordingly, the ruling of the court of appeals should stand only if it is compelled by either the Constitution or the federal immunity statute.

B. The Fifth Amendment Does Not Prohibit the Use of Relevant Portions of a Witness's Immunized Testimony to Prove that the Witness Knowingly Made False Statements Under the Grant of Immunity.

It is well settled that a witness may be prosecuted for perjury or for making false declarations in the course of his immunized testimony. This Court has always permitted such prosecutions, even when the immunity statute in question contained no express exception for perjury. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 178 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577–578 (1976) (plurality opinion); *id.* at 584-585 (Brennan, J., concurring in the result); *id.* at 609 (Stewart, J., concurring in the result); *Glickstein* v. *United States*, 222 U.S. 139 (1911).

The question presented in this case is whether, in such a prosecution, the government may introduce all relevant portions of the witness's immunized testimony

to prove that particular portions of his testimony were knowingly false, or whether the government is limited to introducing only those portions of the immunized testimony that are actually charged as false. We contend that the Constitution permits the introduction of all relevant portions of the witness's testimony in a prosecution for testifying falsely under a grant of immunity. This conclusion follows inevitably if the Court agrees with the following propositions:

(1) The scope of the immunity conferred in overriding an invocation of the privilege is precisely coextensive with the right of non-incrimination enjoyed by the witness at the time the testimony is compelled; and

(2) A witness may not properly invoke the privilege against compulsory self-incrimination to refuse to answer questions before a grand jury on the ground that he may perjure himself in the course of his testimony.

We now turn to establishing the correctness of these two propositions.

1. *A grant of immunity must be as broad as, but need be no broader than, the privilege it displaces.*

The Fifth Amendment privilege against compulsory self-incrimination protects a person against being compelled to testify when he reasonably believes his testimony could incriminate him. *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972). The privilege is available only if the witness's answer to a particular question would expose him to a real and substantial danger of incrimination. If the testimony could not incriminate him, or if the threat of incrimination is merely speculative or remote, the privilege may not be invoked. See *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951); *Rogers* v. *United States*, 340 U.S. 367, 373-375

(1951); *Mason* v. *United States*, 244 U.S. 362, 365-367 (1917); *Heike* v. *United States*, 227 U.S. 131, 144 (1913); *Brown* v. *Walker*, 161 U.S. 591, 599-600 (1896).[7]

Even when a witness makes a valid assertion of the privilege, he can be compelled to testify if the government grants him immunity in place of the protection afforded by the privilege.[8] As long as the immunity removes the danger against which the privilege protects, the witness's testimony can constitutionally be compelled. That is, in order to substitute for the privilege, the immunity must be coextensive with the privilege that it supplants, but it need not be any broader. *Kastigar* v. *United States*, *supra*, 406 U.S. at 449, 453; *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 54, 78 (1964); *Brown* v. *Walker*, *supra*, 161 U.S. at 595, 610.

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[7] This standard is commonly traced to the English case of *Regina* v. *Boyes*, 121 Eng. Rep. 730, 738 (Q.B. 1861) (Cockburn, C. J.) ("the danger to be apprehended must be real and appreciable * * * not a danger of an imaginary and unsubstantial character"). See VIII J. Wigmore, *Evidence* §2260 (McNaughton rev. 1961).

Moreover, the determination whether the risk of incrimination is sufficiently great to warrant the protection of the privilege is not left to the witness, but must be made by a court if the witness's invocation of the privilege is challenged. *United States* v. *Mandujano*, *supra*, 425 U.S. at 575 (plurality opinion); *Hoffman* v. *United States*, *supra*, 341 U.S. at 486; *United States* v. *Burr*, 25 F. Cas. 38, 39-40 (C.C. Va. 1807) (No. 14, 692e) (Marshall, C. J.); *In re Pillo*, 11 N.J. 8, 18-20, 22, 93 A.2d 176, 181-183 (1952) (Brennan, J.).

[8] Granting immunity has long been recognized as an appropriate means of accommodating the right of the public to demand every man's evidence and the right of the individual not to be forced to incriminate himself by his testimony. The historical background of immunity or "indemnity" statutes is traced in *Kastigar* v. *United States*, *supra*, 406 U.S. at 443-446. See also L. Levy, *Origins of the Fifth Amendment* 328-329, 384-404 (1968); VIII J. Wigmore, *Evidence*, *supra*, at §2281; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568 (1963).

2. *The privilege, and thus the immunity granted in its place, ordinarily does not extend to crimes the witness may commit in the future, including perjury.*

Because a witness is not entitled to assert his Fifth Amendment privilege with respect to speculative risks of incrimination, he ordinarily is not permitted to assert the privilege on the basis of crimes he might commit in the future. Thus, even if his testimony would provide the government with information that could prove useful in prosecuting him for offenses that he might commit after testifying, he ordinarily cannot refuse to testify on that ground. See *United States* v. *Freed*, 401 U.S. 601, 606–607 (1971); *id.* at 611–612 (Brennan, J., concurring); *United States* v. *Bryan*, 339 U.S. 323, 340–341 (1950); *Glickstein* v. *United States*, *supra*, 222 U.S. at 142; *United States* v. *Tramunti*, 500 F.2d 1334, 1344 (2d Cir. 1974).

In *Marchetti* v. *United States*, *supra*, 390 U.S. at 39, the Court declined to apply a rigid distinction between past and future offenses in determining whether the privilege is available. The Court noted that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination" (390 U.S. at 54). Nonetheless, it declined to apply that general principle to the case of a professional gambler engaged in a continuing course of illegal conduct and faced with a registration scheme designed primarily for law enforcement purposes. In those circumstances, the Court concluded, the risk of incrimination with respect to future acts was sufficient to justify upholding the claim of privilege.[9]

[9]The Court also upheld the claim of privilege on the ground that the registration and tax payment requirements at issue in the case posed substantial hazards of incrimination with respect to Marchetti's current and past activities, because "satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted" (390 U.S. at 52).

The subsequent decision in *United States* v. *Freed*, *supra*, made it clear that the Court in *Marchetti* did not mean to discard the distinction between past and future crimes in testing the availability of the privilege. To the contrary, the Court in *Freed* reaffirmed the past-future distinction and the principle that the privilege cannot be asserted to protect against incrimination for future crimes. *Freed* thus suggests that *Marchetti*'s recognition of a possible prospective content to the privilege is limited to cases in which the privilege is asserted to avoid a substantial and non-speculative risk of incrimination for future acts that are part of an ongoing criminal enterprise.[10]

In *Freed*, the Court upheld the provision of the National Firearms Act that requires a detailed report to be filed upon the transfer of certain classes of firearms. The Act provides that the information furnished in the report could not be used against either party to the transfer with respect to any present or past criminal acts. The defendant argued that even though the information in the transfer registration forms could not be used to incriminate him for present or past acts, it could be used in connection with any unlawful acts he might commit in the future and that the statutory immunity was therefore insufficient to displace the privilege. The Court rejected that argument, concluding that the threat of incrimination with respect to offenses the defendant might commit in the future was not "substantial and 'real' " (401 U.S. at 606). The defendant's argument, the Court held (401 U.S. at 606–607),

[10]The risk of incrimination in both *Freed* and the present case is different both in kind and degree from the risk of incrimination facing Marchetti. The statute at issue in *Marchetti* required professional gamblers to acquire a federal gambling tax stamp, which in turn required "the declaration of a present intent to commence gambling activities" and thus obliged "even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes." 390 U.S. at 53. Respondent's compelled grand jury testimony, by contrast, did

> assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

The Court therefore held that the statutory immunity from the use of the registration materials to prove any past or current crimes was sufficient to overcome the defendant's assertion of his Fifth Amendment privilege.[11]

In his concurring opinion, Mr. Justice Brennan expanded on this point, noting that the privilege "does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibily commit in the future with the registered firearm." 401 U.S. at 611 (Brennan, J., concurring). The immunity in the statute, prohibiting the use of information obtained in the registration forms with respect to past crimes, is "co-extensive with the

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not require him to declare a present intent to commit perjury. His testimony became incriminating evidence of a false declarations offense only when he lied before the grand jury after he had been given immunity. The compelled disclosure in *Marchetti* could help incriminate the registrant even if he never took steps to commit any further gambling offenses. Here, by contrast, respondent's compelled testimony had no incriminating potential with respect to a perjury offense until he decided to lie and thus made it incriminating. In other words, unlike the registrant in *Marchetti*, once respondent received immunity, he "had nothing to fear from telling the truth." *United States* v. *Wilcox*, 450 F.2d 1131, 1141 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972).

[11] The Court also noted that, unlike the information in *Marchetti*, the information on the transfer form was not ordinarily made available to state and federal law enforcement agencies, 401 U.S. at 606, and for that reason as well the defendant's fear of incrimination was insubstantial.

privilege" (401 U.S. at 612), Justice Brennan concluded, and the information can therefore lawfully be compelled without violating the privilege against compulsory self-incrimination.

The past-future distinction is supported not only by the inherent speculativeness that attends most claims of possible future incrimination, but also by consideration of the policies that underlie the constitutional privilege. The privilege is in essence a shield designed to protect an actual or potential criminal defendant from having the government pry from his lips statements that could be used to convict him of crime. *Murphy* v. *Waterfront Commission, supra,* 378 U.S. at 55. It is the product of a judgment by the Framers that the distastefulness of inquisitorial practices designed to produce a suspect's confession outweighs the value to the criminal justice process of requiring an accused to account for his actions.

As applied to a future offense, however, the privilege becomes a sword rather than a shield, and the balance of interests is quite different. At the time he is granted immunity, a witness's testimony ordinarily cannot incriminate him with respect to a crime he has not yet committed. Thus, the effect of immunizing the witness from the use of his testimony to prove a subsequent offense, be it perjury or any other, is simply to permit the individual to commit that crime free of the risk that his prior testimony can be used to convict him. There is nothing in the policies underlying the privilege that would justify this kind of extension of its sweep.

3. *Respondent's receipt of immunity did not bar the use of his testimony to prove the falsity of his contemporaneous sworn statements.*

In this case, of course, respondent did not invoke the privilege on grounds of possible incrimination as to any future offense; rather, he presented a valid claim of privilege based upon the risk of incrimination as to al-

ready consummated offenses. The court of appeals held that upon making a legitimate claim of the privilege, he acquired a comprehensive immunity against any prospective use whatsoever of testimony given under compulsion.

a. We submit that the immunity respondent acquired was not so all-encompassing, but instead was precisely co-extensive with the scope of the privilege available to him at the time his testimony was compelled. The Constitution does not require that the grant of immunity protect a witness from dangers that fall outside the protection of the privilege. *Ullmann* v. *United States*, 350 U.S. 422, 430–431, 438–439 (1956); *Heike* v. *United States*, *supra*, 227 U.S. at 142–143, Korman, *The Use of Testimony Compelled Under a Grant of Use Immunity*, 44 Brooklyn L. Rev. 935, 940 (1978).[12] Thus, the legitimacy of any proposed use of the compelled testimony can be ascertained by determining whether, at the time he was called upon to give that testimony, the witness could successfully have invoked his privilege to guard against that use. If he could, then by compelling the testimony over a claim of the privilege, the government forgoes the ability to make that use of the tes-

[12] For example, a witness cannot assert the privilege to escape liability in a civil suit, or disgrace in the community, or even the loss of a job or some other non-criminal sanction. *Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284–285 (1968); VIII J. Wigmore, *Evidence*, *supra*, at §§2254-2255. He cannot even assert the privilege because he fears for his life if he testifies. *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961); *In re Grand Jury Procedings*, 509 F. 2d 1349, 1352 (5th Cir. 1975). It is therefore unnecessary for the grant of immunity to protect against those consequences in order to displace the privilege. *Ullmann* v. *United States*, *supra*, 350 U.S. at 430-431; *Smith* v. *United States*, 337 U.S. 137, 147 (1949); *Brown* v. *Walker*, *supra*, 161 U.S. at 605-606. Rather, the privilege extends only to possible incrimination in a criminal case.

timony. On the other hand, if the use that the government proposes to make of the immunized testimony could not have been adduced as a valid basis for claiming the privilege, the immunity does not protect against that use.

In the present case, respondent was privileged to decline to testify with regard to his dealings with Brown, his travels to Florida, or his interview with the FBI. For that reason, the grant of immunity under which his grand jury testimony was compelled precludes the use of his testimony or its fruits to help convict him of offenses arising out of any of the activities about which he was questioned before the grand jury. See *New Jersey* v. *Portash*, No. 77-1489 (Mar. 20, 1979), slip op. 7.

Similarly, if prior to his appearance before the grand jury respondent had given a false sworn statement at a different proceeding about the matters as to which he was questioned before the grand jury, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would expose him to a prosecution for perjury or false declarations. See *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), cert. denied, 431 U.S. 970 (1977). For that reason, a grant of immunity would protect him from the use of his testimony to prove that he committed perjury during a prior proceeding. *In re Grand Jury Proceedings*, *supra*, 509 F.2d at 1351; *United States* v. *Watkins*, 505 F.2d 545, 546 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973).

On the other hand, if respondent had declined to testify before the grand jury on the ground that his testimony could be used against him if he should perjure himself, his claim of privilege would not have been sustained. *United States* v. *Partin*, 552 F.2d 621, 632 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *United States* v. *Kirk*, 528 F.2d 1057, 1061–1062 (5th Cir. 1976); *Kronick* v. *United States*, 343 F.2d 436, 441 (9th Cir.

1965). In effect, his claim would have been that without the protection of the privilege he would not be as free to perjure himself before the grand jury, since the use of portions of his grand jury testimony might make it easier for the government to prove that other portions of his testimony were false. This impediment to respondent's ability to perjure himself in giving his immunized testimony is not a "real danger of legal detriment arising from the disclosure." *Rogers* v. *United States*, 340 U.S. 367, 372–373 (1951). A possible future act of perjury, even a planned one, is not the kind of criminal exposure that the privilege against compulsory self-incrimination was intended to reach.

Accordingly, because respondent could have expected no protection from his Fifth Amendment privilege for a possible future act of perjury, it follows that there is no constitutional barrier to the use of relevant portions of his immunized grand jury testimony, even if truthful, to establish the falsity of other portions of that testimony.

b. The court of appeals rejected this analysis. Instead, it relied on language from *Kastigar* v. *United States*, *supra*, 406 U.S. at 453, 458–459, to hold that respondent's immunized testimony could not be used for any purpose except as the *corpus deliciti* of the false statements offense. We submit that the court of appeals read *Kastigar* far too broadly.

In stating that the government could not use testimony compelled under a grant of immunity "in *any* respect" (406 U.S. at 453; emphasis in original), the Court in *Kastigar* was distinguishing between "use and derivative use" immunity, which it held constitutionally sufficient, and the more limited "use" immunity that was held insufficient in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). In order for the immunity to be commensurate with the privilege, the *Kastigar* Court held, the government must be denied not only the right to use compelled testimony as evidence at trial, but also

the right to use the testimony to develop leads and strengthen its case against the defendant in indirect ways.

This holding falls far short of suggesting that immunized testimony can never be used against a witness. As we have noted (see page 20 note 12, *supra*), immunized testimony can be used for a number of purposes: it can be used to prove that the testimony was perjured; it can be used against the witness in civil proceedings; and it can be used to deny the witness a job or other important benefits that he might have continued to enjoy had he remained silent. It is therefore inaccurate to say that the grant of immunity prohibits the government from making any use whatever of the compelled testimony.

What *Kastigar* establishes is that the Constitution prohibits the use of compelled testimony for any purpose as to which a claim of privilege would have been upheld. Thus, an immunized witness may be prosecuted for testifying falsely under a grant of immunity because, if he had claimed the privilege on the ground that he might lie before the grand jury, his claim would have been rejected and he could have been required to testify without immunity. In other words, an immunity grant provides the same protection against prosecution for contemporaneous perjury that the privilege does: that is, no protection at all.[13]

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[13]The Court has used similar "any use" language in *Murphy* v. *Waterfront Commission*, *supra*, and *New Jersey* v. *Portash*, *supra*, in describing the protection afforded by a grant of immunity. In *Murphy*, the Court stated that the federal government could not make "any * * * use" of testimony compelled under a state grant of immunity, referring to possible use in a federal criminal prosecution. And in *Portash*, the Court held that the prosecution could not use immunized testimony to impeach the defendant at his trial for the substantive offenses about which he had testified before the grand jury. In both cases the Court barred the use of a defendant's immunized testimony to help the

This point is perhaps best underscored by comparing the protection that respondent would have obtained under the previous system of transactional immunity with the protection that he is claiming in this case. A grant of transactional immunity provides the witness protection from prosecution for any offense about which he is required to testify. Even under transactional immunity, however, the witness enjoys no protection with respect to testimony as to which he could have asserted no privilege.

In *Heike* v. *United States*, *supra*, for example, the government granted transactional immunity to a witness in an antitrust investigation. The witness was later indicted on tax fraud charges only remotely related to the matters at issue in the antitrust investigation. The Court held that the portions of his grand jury testimony that related to the fraud charges were not incriminating and that the witness could not have made a valid claim of the privilege with respect to that testimony. Therefore, the Court held, the witness's immunity provided no protection against his subsequent prosecution for tax fraud.

The *Kastigar* Court clearly did not intend to suggest that use immunity is broader in any respect than transactional immunity. Accordingly, the statements in *Kastigar* that immunized testimony may not be used in "any way" must be interpreted to apply only to uses that the witness could have avoided by a timely assertion of the privilege.

c. The only decision of this Court that bears directly on the issue presented in this case is *Cameron* v. *United States*, 231 U.S. 710 (1914). In *Cameron* the

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prosecution establish the defendant's guilt of the same crime as to which he initially claimed the privilege and as to which his privilege was overriden by a grant of immunity. In the instant case, by contrast, the immunized testimony is being used to prove a crime that had not occurred at the time petitioner was granted immunity and as to which he then had no testimonial privilege.

defendant was indicted for committing perjury in two separate proceedings: in a hearing before a bankruptcy commissioner and in a subsequent proceeding before the bankruptcy referee. At trial, the government introduced the defendant's testimony in the proceeding before the commissioner to prove that he perjured himself in the proceeding before the referee. Considering only statutory issues, the Court held that under the applicable immunity statute, Rev. Stat. Section 860, 15 Stat. 37, the testimony given in the proceeding before the commissioner should not have been received to establish perjury in the proceeding before the referee. 231 U.S. at 724. The Court, however, rejected the defendant's alternative argument that in proving perjury in a single proceeding the government may introduce only the portion of a witness's testimony that is specifically charged as perjurious. The immunity granted by the statute, the Court noted,

> was not intended to put a premium upon perjury by giving protection against the use of the testimony in prosecutions for that crime; and we cannot agree with petitioner's contention that the use of such testimony is limited to proving that it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony *for any legitimate purpose in establishing the charge made.* * * *

231 U.S. at 720–721 (emphasis added).[14]

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[14] The Court's holding that testimony in one proceeding could not be used to prove perjury in the other was based on a construction of the immunity statute and not on the Fifth Amendment. Although the statute authorized prosecutions for perjury committed under a grant of immunity, it prohibited the use of any immunized testimony "in any criminal proceeding." The Court construed the statute to permit the government to use any of the testimony in a proceeding to prove perjury in that proceeding, but not to use the statements to prove perjury in the other proceeding. The Court made it clear that its ruling was based on a construction of the applicable immunity statute, and not on any constitutional prohibition. See 231 U.S. at 721, 724.

To be sure, the ruling that immunized testimony could lawfully be used "for any legitimate purpose" to prove perjury in the same proceeding was dictum. Yet it was carefully considered dictum, based on contemporaneous decisions by two courts of appeals in *Daniels* v. *United States*, 196 F. 459, 462–463 (6th Cir. 1912) and *Edelstein* v. *United States*, 149 F. 636, 642-644 (8th Cir. 1906).[15] In both of those cases, the courts held that the immunity granted to the defendant was coextensive with the constitutional privilege and that it therefore provided no protection in prosecutions for perjury committed under the grant of immunity. In *Daniels*, the court observed that the Fifth Amendment privilege "can have reference only to crimes which have already been committed at the time when the evidence is compelled," and that the statutory immunity therefore "does not have reference to any criminal proceeding based on a crime inherent in the bankrupt's examination." 196 F. at 463. Accordingly, the court concluded, "where the bankrupt is indicted for testifying falsely in one part of his examination, his testimony in other parts of the same examination, if tending to support the indictment, may be given in evidence against him." *Ibid.*

More recently, several other courts of appeals, in dictum, have agreed with the approach taken by the court of appeals in this case. Both *United States* v. *Berardelli*, 565 F.2d 24 (2d Cir. 1977), and *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), were appeals by witnesses who had been held in contempt for refusing to testify at trial, despite a grant of immunity. In both cases, the witnesses sought to justify their refusal to testify on the ground that their answers, if inconsistent with testimony they had given in a prior grand jury proceeding, might be used to convict them of making false declarations under the inconsistent statements theory of proof set out in 18 U.S.C. 1623(c). In *United States* v. *Housand*, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), a prospective defense witness who had earlier testified before the grand jury under a grant of immunity refused, in the absence of a new grant of immunity, to testify at trial. The witness's refusal was upheld by the district court, and the defendant challenged the correctness of that ruling on appeal.

[15] The two court of appeals cases were cited to the *Cameron* Court, together with *Glickstein* and a district court case, *United States* v. *Brod*, 176 F. 165 (N.D. Ga. 1912). See 231 U.S. at 713.

The contempt convictions of Patrick and Berardelli were affirmed, while Housand's claim was rejected. Each opinion explicitly, although unnecessarily and with little supporting analysis, stated that no incriminating use of any kind could be made of truthful immunized testimony, even to prove a later perjury. See also *United States* v. *Dunn*, 577 F.2d 119, 125-126 (10th Cir. 1978), rev'd on other grounds, No. 77–6949 (June 4, 1979).

The results in *Berardelli*, *Housand*, and *Patrick* were correct without regard to their dicta and are not inconsistent with the result we urge in this case. In each of those cases, the witness, having previously testified, was called to testify on the same subject in a second proceeding. In each case, he invoked his privilege in the second proceeding on the ground that his truthful testimony on that occasion might tend to establish the falsity of his prior testimony, thereby incriminating him. Each invocation of the privilege was plainly proper and foreclosed the compulsion of testimony without a grant of immunity. In each instance, moreover, the grant of immunity would have precluded the use of the testimony at the second proceeding to establish the falsity of the prior testimony, whether pursuant to an inconsistent statements theory or otherwise. Since this is so, there was no necessity for the courts to express any view about the use that might be made of any im-

munized testimony, truthful or otherwise, given during an earlier proceeding.

In the instant case, by contrast, respondent invoked the privilege and was granted immunity prior to his appearance before the grand jury. The immunity he was granted at that time protected him against the use of his testimony to prove any prior offense. Unlike the witnesses in *Berardelli*, *Housand*, and *Patrick*, respondent was not summoned to testify in a subsequent proceeding, and he did not assert his privilege anew at any point in the course of his grand jury testimony. Accordingly, the immunity granted at the outset of the grand jury proceeding did not protect him against the use of his testimony to prove any offenses he might have committed in the course of that testimony, including perjury.

d. The competing analysis employed by the court of appeals is unsatisfactory. The court began with the proposition that untruthful immunized testimony is not constitutionally protected (Pet. App. 13a). That much, of course, is correct. See *United States* v. *Dunn*, *supra* 577 F.2d at 125–126; *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); *United States* v. *Tramunti*, *supra*, 500 F.2d at 1343-1344; cf. *United States* v. *Kahan*, 415 U.S. 239 (1974). However, the court's further suggestion that *only* false testimony is unprotected by the grant of immunity (see Pet. App. 13a–14a) is unworkable for several reasons.

First, as we have shown above, truthful immunized testimony may be used for any purpose not protected by the privilege that the grant of immunity displaced. Moreover, in a perjury prosecution, the allegedly false testimony is not established as false prior to the jury's verdict. Thus, under the court's analysis, immunized testimony may be "used" against a defendant absent any prior showing that it is false. And if the defendant is acquitted, the immunized testimony will have been

used against him without any showing of falsity at all.[16] Finally, even if it were correct that only false immunized testimony is admissible in a perjury prosecution, the standard of admissibility adopted by the court of appeals is inconsistent with that principle. Although the court of appeals at one point appeared to restrict the government to introducing only those statements specifically charged as the *corpus delicti* of the false statements prosecution (Pet. App. 11a–12a), it subsequently stated that the government may introduce not only the statements charged to be false, but also "that minimal testimony *essential* to place the charged falsehood into its proper context" (*id.* at 14a n.9) (emphasis in original).

Thus, the court of appeals acknowledged that some truthful immunized testimony may be introduced in a perjury prosecution. But with that provision, the court in effect erected a novel and exacting standard of relevancy for introducing truthful immunized testimony. The testimony must do more than simply tend to prove some element of the offense, see Fed. R. Evid. 401. It must be "essential" to place the alleged falsehood "into its proper context." Aside from the problems that would face a district court in trying to determine whether particular testimony was sufficiently "essential," or whether the testimony went beyond simply providing "context" for the alleged falsehood, there is no constitutional basis for the court's test. If the defendant is constitutionally protected against the use of truthful immunized testimony, he is protected against its use regardless of whether it is "essential" and regardless of whether it places other testimony "in context." And if the testimony is unprotected, as we contend, it may be used as long as it satisfies the ordinary test of relevancy.

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[16] The Second Circuit has acknowledged this problem. See *United States* v. *Anzalone*, 555 F.2d 317, 320 (2d Cir. 1977); *United States* v. *Moss*, *supra*, 562 F.2d at 165.

C. The Federal Immunity Statute Does Not Prohibit the Use of Truthful, Immunized Testimony to Prove the Falsity of Contemporaneous Non-immunized Testimony

The federal immunity statute, 18 U.S.C. 6002, expressly permits the use of immunized testimony in "a prosecution for perjury [or] giving a false statement." Moreover, it is beyond serious dispute that the statutory reference to prosecutions for "giving a false statement" includes prosecutions brought under 18 U.S.C. 1623, the federal false declarations statute. See *United States* v. *Anzalone*, *supra*. On its face, therefore, the immunity statute poses no obstacle to the use of immunized testimony that was made in this case.

Although the court of appeals held that the introduction of respondent's immunized testimony violated the immunity statute as well as the Constitution (Pet. App. 14a & n.9), it did not analyze the statutory point separately or suggest any specific basis for concluding that the statute supplied independent grounds for exclusion of the evidence. Instead, it simply regarded the immunity conferred by the statute as being coextensive with that required by the Constitution. We agree that the statutory and constitutional protections are coextensive, but because we contend that the Constitution permits the use of immunized testimony that was made in this case, it follows that the statute permits that use as well.

1. *The legislative history of the immunity statute shows that Congress intended to provide only such immunity as is constitutionally required.*

The federal immunity statute, 18 U.S.C. 6002, was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Section 201(a), 84 Stat. 927. It was drafted in response to a reexamination of the constitutional principles applicable to immunity, prompted in part by the decision in *Murphy* v. *Waterfront Commission*, *supra*, which indicated that con-

temporary federal immunity statutes that granted broad transactional immunity provided more protection than was required by the Constitution. See *Kastigar* v. *United States*, *supra*, 406 U.S. at 452 & n.36. In both the Senate and House reports on the proposed legislation, it was made clear that the purpose of the new provision was to narrow the scope of a grant of immunity to precisely what the Constitution requires, and no more:

> This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. * * * It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) rather [than] the transaction immunity concept of *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892).

S. Rep. No. 91-617, 91st Cong., 1st Sess. 145 (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 42 (1970). See also S. Rep. No. 91-617, *supra*, at 107-108 (comments of Department of Justice).

The proposal for the federal use immunity statute derived from a 1969 report of the National Commission on the Reform of the Federal Criminal Laws. See II *Working Papers of the National Commission on Reform of Federal Criminal Laws* 1445-1448 (1970). The report proposed a general federal use immunity statute under which "the immunity conferred would be confined to the scope required by the Fifth amendment" (*id.* at 1405). See also *Measures Relating to Organized Crime: Hearings on S. 30, etc., Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 15, 326 (1969) (hereafter "Senate Hearings").

The statements of the sponsors of the bill, like the comments in the House and Senate Reports, reflect a general understanding that the bill would restrict the immunity conferred under its provisions to that required by the Constitution. Senator McClellan, the

chief sponsor of the bill in the Senate, emphasized that the bill was designed to provide only the minimum required immunity. "Giving immunity where it is not necessary," he stated, "is giving an unnecessary gratuity to a crime, a step no sane society ought ever to take." 115 Cong. Rec. 5879 (1969). Representative Poff, the chief sponsor in the House, observed that the bill would give a witness "all that is guaranteed him under the Constitution" (116 Cong. Rec. 35291 (1970)). Quoting Mr. Justice White's observation in *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 107, he added that " '[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination' " (116 Cong. Rec. 35291 (1970)).

These legislative materials make it clear that Congress did not intend to grant any broader protection to an immunized witness than is required by the Constitution. Both this Court and others have agreed that the immunity provided in Section 6002 "is coextensive with the scope of the privilege against self-incrimination" (*Kastigar* v. *United States*, *supra*, 406 U.S. at 453) and that Congress intended "to restrict the scope of immunity authorized by the statute to that which is constitutionally required" (*In re Daley*, 549 F.2d 469, 477 (7th Cir.), cert. denied, 434 U.S. 829 (1977)). See also *United States* v. *Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978), cert. granted No. 78-5705 (Feb. 2, 1979); *Childs* v. *McCord*, 420 F. Supp. 428, 431 (D. Md. 1976), aff'd, 556 F.2d 1178 (4th Cir. 1977). The statute therefore should not be construed to impose any additional and more stringent limitation than the Constitution demands on the uses to which immunized testimony may be put.[17]

[17]The reference to "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the [immunity] order" was not intended to constitute an exhaustive list of permissible uses for immunized testimony. The list of exceptions to the general rule barring the use of immunized testimony was added for quite the opposite reason: to forestall a construction that would unnecessarily restrict the uses to which immunized testimony could be put. As both the Senate and House reports stated: "The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. * * * It is included out of caution to insure that such immunity is not given." S. Rep. No. 91-617, *supra*, at 145; H.R. Rep. No. 91-1549, *supra*, at 42. Congress thus assumed, in accordance with decisions of this Court, that the ostensibly restrictive language of use immunity statutes would not preclude uses of immunized testimony that are consistent with the Constitution. See *United States* v. *Bryan*, *supra*, 339 U.S. at 338-340; *Heike* v. *United States*, *supra*, 227 U.S. at 141; *Glickstein* v. *United States*, *supra*.

2. *Congress intended the false declarations statute to provide an effective instrument for prosecuting persons for making false statements under a grant of immunity.*

The false declarations statute, 18 U.S.C. 1623, like the federal use immunity statute, was enacted as part of the Organized Crime Control Act of 1970.[18] It was designed to facilitate proof of false swearing by doing away with several common law rules of evidence that traditionally had applied to prosecutions under the federal perjury statute, 18 U.S.C. 1621. See *Dunn* v. *United States*, *supra*. In order to facilitate prosecutions for false swearing before or ancillary to a grand jury or a court, Congress made the common law rules such as the two-witness rule and the direct-evidence rule inapplicable to prosecutions under Section 1623. This step, it was thought, would result in "greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth." S. Rep. No. 91-617, *supra*, at 57-59; see also H.R. Rep. No. 91-1549, *supra*, at 33. In addition, in order further to ease the traditional difficulties faced by the prosecution in perjury cases, Con-

[18]The immunity provisions were contained in Title II of the Act, while the false declarations statute was contained in Title IV, Pub. L. No. 91-452, Section 401(a), 84 Stat. 932.

gress provided that contradictory statements under oath could supply the basis for a perjury prosecution without specific proof of the falsity of one of the statements. 18 U.S.C. 1623 (c); S. Rep. No. 91-617, *supra*, at 58.

One of the main reasons that Congress sought to facilitate prosecutions for false swearing was to provide meaningful sanctions to ensure that immunized testimony would be truthful. See S. Rep. No. 91-617, *supra*, at 57-58. The prospects for perjury prosecutions under the transactional immunity statutes then in force were viewed as poor, and the likelihood of conviction low. *Id.* at 57. In explaining the liberalized provisions for proving a false declarations offense, Senator McClellan, the chief sponsor of the bill in the Senate, observed (115 Cong. Rec. 5880 (1969)):

> A subpoena can compel the attendance of a witness before a grand jury or at trial. An immunity grant can displace his privilege against self-incrimination. The threat of imprisonment for civil contempt can legitimately coerce him into testifying. But only the possibility of a perjury prosecution, or some related sanction, can provide any guarantee that his testimony will be truthful.

Similarly, Representative Poff, the chief sponsor in the House, emphasized that the provision in the statute facilitating the proof of false declarations would be equally applicable to prosecutions involving immunized testimony (116 Cong. Rec. 35,292 (1970)):

> The integrity of the criminal trial depends upon the power to compel truthful testimony and to punish falsehood. Witness immunity such as title II will provide can be an effective prosecutive weapon only if the immunized witness testifies truthfully. The infrequency of the use of perjury sanctions—due to the difficulty of securing convictions under existing law—has limited the effectiveness of established criminal sanctions for false statements under oath.

Thus, far from intending to exclude the use of compelled testimony in false declarations prosecutions, Congress was concerned with guaranteeing the truthfulness of all types of formal testimony, including that of immunized witnesses, when it introduced the liberalized proof provisions embodied in Section 1623.

Accordingly, the federal immunity statute should be read, consistently with the Constitution, to permit the use of relevant immunized testimony to prove false swearing committed under the grant of immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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